

ST 97-32

TAX TYPE: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	Docket #
v.)	
)	IBT #
TAXPAYER,)	
Responsible Officer)	NPL #

RECOMMENDATION FOR DISPOSITION

Synopsis:

The Illinois Department of Revenue (the "Department") on October 8, 1991, issued a Notice of Penalty Liability to TAXPAYER (the "Taxpayer") as the responsible officer for retailers' occupation tax liabilities incurred by CORPORATION, for various periods from 1984 through 1988 in the amount of \$138,938.78. The taxpayer timely protested the Notice of Penalty Liability and requested a hearing. The representatives of the Department and the taxpayer stipulated that the case be submitted for decision to the administrative law judge based upon the stipulation of facts and briefs submitted by the parties. It is recommended the decision of the Director of the Department be that the taxpayer was not liable for a portion of the tax imposed by the Notice of Penalty Liability.

Findings of Fact:

1. On October 8, 1991, the Department issued Notice of Penalty Liability (the "NPL") No. XXXX, in the amount of \$138,938.78, to the taxpayer as the responsible officer of CORPORATION for retailers' occupation tax liabilities. The periods covered by the NPL included: April 1984, June 1984 through December 1984, April 1985, July and August 1985, October through December 1985, January and February 1986, April through December 1986, and January through October 1987. (Stip. Ex. No. A)

2. For all periods listed on the NPL, the taxpayer was a person responsible for filing returns for CORPORATION, an Illinois corporation (the "Corporation") under the Retailers' Occupation Tax Act (the "ROTA") and for paying over the tax due within the meaning of Ill. Rev. Stat. ch. 120, para. 452.5 (now 35 ILCS 120/13.5)¹. (Stip. No. 1)

3. For the periods listed on the NPL, the taxpayer willfully failed to make a payment of the ROTA tax due from the Corporation, within the meaning of Ill. Rev. Stat. ch. 120, para. 452.5 (now 35 **ILCS** 120/13.5)¹. (Stip. No. 2)

4. The liabilities for all periods listed on the NPL predate the issuance of the NPL by more than three years. (Stip. No. 3)

5. The Corporation, on January 10, 1985, filed its Petition as Debtor under Chapter 11 of the United States Bankruptcy Code. On or

¹. The Uniform Penalty and Interest Act, found at 35 **ILCS** 735/3-1 *et seq.*, effective January 1, 1994, replaced various parts of the tax acts' provisions for penalties and interest. This section is currently found at 35 **ILCS** 735/3-7.

about October 13, 1987, the Chapter 11 proceeding was converted to a proceeding under Chapter 7 of the United States Bankruptcy Code. The Chapter 7 proceeding was closed on or about March 31, 1990 following the filing of the Final Account by the Bankruptcy Trustee. (Stip. No. 4)

6. The Corporation filed its returns required under the ROTA for each of the periods listed on the NPL. (Stip. No. 5)

7. The NPL was issued to the Taxpayer on October 8, 1991, and a timely protest was filed on October 16, 1991. (Stip. No. 6)

8. The taxpayer has never individually been a debtor in a proceeding under the United States Bankruptcy Code. (Stip. No. 7)

9. The deficiencies were assessed against the Corporation by the Department on the following dates:

G891925-03/28/87 G251726-02/08/86 G892355-03/28/87 G255014-05/14/86
G893521-03/29/87 G257530-07/21/86 G058168-03/19/85 G258488-08/18/86
G270240-05/10/87 G055497-12/19/84 G058144-03/20/85 G058513-04/08/85
G059121-05/18/85 G060286-07/08/85 G274229-08/24/87 G266013-02/23/87
G251058-01/20/86 G251547-01/25/86

B332404-06/04/87 B316467-03/04/87 B283665-08/05/86 B326689-05/05/87
B288810-09/04/86 B292684-10/07/86 B296354-11/06/86 B300608-01/20/87
B338920-08/06/87 B311843-02/03/87 B342386-09/02/87 B346842-10/02/87
B352690-11/04/87 B370628-02/13/88

H099811-01/03/85 K252093-01/23/86

After such deficiencies were assessed, there were no judicial proceedings instituted to review or otherwise determine the amount of such deficiencies with respect to the Corporation. (Stip. No. 8)

10. The assessment numbers were preceded with either the letter "G", "B", "K", or "H". (Stip. No. 8)

11. The assessments with assessment number beginning with the letter "B" or "H" are based on returns as filed by the taxpayer.

(Stip No. 9)

12. The assessments with assessment numbers beginning with the letter "G" or "K" correspond to amounts in Notices of Tax Liability issued by the Department to the Corporation after an incomplete return or an erroneous return was filed by the Corporation. The adjustments in such Notices of Tax Liability were made by the Department upon review of the Corporation's returns and without audit of the Corporation's books and records. (Stip. No. 10)

13. The parties agreed that this case is submitted for decision to the Administrative Law Judge based upon stipulation of facts and without hearing. (Stip. No. 11)

Conclusions of Law:

The Retailers' Occupation Tax Act imposes a liability upon corporate officers of businesses that have the control, supervision or responsibility of filing returns and making payments of the taxes. See Ill. Rev. Stat. ch. 120, para. 452.5² That section also states:

The personal liability of such officer or employee as provided herein shall survive the dissolution of the corporation; however no notice of penalty liability shall be issued after the expiration of 3 years after the date all proceedings in court for the review of any final or revised final assessments issued against a corporation which constitute the basis of such penalty liability have terminated or the time for taking thereof has expired without such proceedings being instituted or after the expiration of 3 years after the date any return is filed with the Department by a corporation in cases where the return constitutes the basis of such liability.

The NPL is *prima facie* correct and the burden is on the taxpayer

². This section is currently found at 35 **ILCS** 735/3-7.

to rebut this presumption. Branson v. Department of Revenue, 168 Ill.2d 247 (1995)

The taxpayer does not argue that he was not a responsible officer of the corporation nor that he willfully failed to pay the taxes due. Rather, his argument is that the NPL was not timely issued by the Department because it was not issued within the three year limitations period found at para. 452.5. Regarding the limitation period where the return constitutes the basis of the liability, the taxpayer, in his brief states:

Where a return is filed by a corporation which constitutes the basis of liability for the personal liability penalty against a responsible individual of that corporation, the notice of penalty liability must be issued within three years after the date the return is filed. In the case at bar, the Corporation did file its ROTA returns, and each such return was filed prior to the date the Department assessed any deficiency against the Corporation. Those returns provide the basis of liability against the Corporation and correspondingly provide the basis of the proposed penalty liability against the Taxpayer for both the "B" and "H" assessments and the "G" and "K" assessments.

i) "B" and "H" assessments

As indicated in the Stipulation (Par. 8), the Department's assessments of deficiencies against the Corporation begin with different letters. Those assessments beginning with the letters "B" or "H" are stipulated to be based on the returns as filed by the Corporation. Accordingly, the period of limitations for issuing the NPL as related to the "B" and "H" assessments is three years following the filing of the applicable return of the Corporation. In each instance, the return of the Corporation was filed prior to the assessment date. Of the "B" and "H" assessments, the latest assessment date is February 13, 1988. As such the NPL as relates to all of the "B" and "H" assessments was required to be issued by the Department before February 13, 1991. The Department issued the NPL to the Taxpayer on October 8, 1991.

ii) "G" and "K" assessments

Besides the "B" and "H" assessments, there are other assessments against the Corporation which begin with the letters "G" and "K". These assessments correspond to amounts in Notices of Tax Liability issued by the Department to the Corporation. In each of these instances, the Corporation did file its ROTA return. The Department did not audit the return but made minor adjustments and corrections based on the information that was contained in the return. As compared to the liability set forth on the return filed by the Corporation, there was typically a very small change in tax liability ... the adjustments ... are for computational and arithmetical items....

Since the "G" and "K" assessments are based on the Corporation's returns, the NPL for such assessments must be issued within three years after the applicable return is filed. The Corporation's return for each period was filed before the assessment date, and the latest assessment date for the "G" and "K" assessments was August 24, 1987. The period of limitations for issuing the NPL to the Taxpayer for the "G" and "K" assessments expired no later than August 24, 1990. The NPL was issued to the Taxpayer on October 8, 1991 and was too late to be effective for the "G" and "K" assessments. (See taxpayer's brief pp. 6-7, 9)

The position of the Department, as asserted in its memorandum, is simple and raises two arguments in support of upholding the NPL. The arguments raised are as follows:

Where the basis for the liability is a Notice of Tax Liability (NTL), the Department has three years from the date all proceedings for the review of the liability have terminated, or the time for instituting such proceedings has expired without such proceedings being instituted, in which to issue the NPL against the allegedly responsible officer. Bankruptcy Code Section 505 gives the Bankruptcy Court jurisdiction to determine the amount and legality of any tax. The corporate bankruptcy was filed on January 10, 1985, and was closed on or about March 31, 1990. The NPL was issued to Staats on October 8, 1991. The Corporation could have availed itself of the Bankruptcy Courts [sic] jurisdiction at any time to review the corporate assessments. Therefore, the Department asserts that by the plain meaning of the limitations language contained in the above cited statute, the NPL at issue herein was issued within three years of the expiration of the time for the Corporation to seek review of the assessments, where the return does not form the basis of the liability.

Where the NPL is based on an assessment based on a final return Section 13.5 provides that the Department has three years from the date the return is filed to issue an NPL. As an additional basis for tolling the statute of limitations, the Department would argue that the tolling provisions found in the last paragraph of Section 13.5 were intended by the Legislature to govern the statute of limitations regarding the issuance of the NPL and should be extended by reference. This language tolls the time for filing suit to reduce a penalty assessment to judgment. By the referenced language the statute of limitations for filing suit is tolled by any amount of time the Department is precluded from filing suit to collect the tax from the corporate taxpayer. Section 362 of the Bankruptcy Code provides for an automatic stay which, in the case at bar, acted as an injunction precluding the Department from initiating such an action during the time the Corporation was in bankruptcy. Therefore, the Department asserts that the time for issuing the NPL is similarly extended. If this language has the effect asserted by the Department then the NPL would be timely as to all corporate assessments. (See Memorandum of the Department of Revenue pp. 1-2)

In response to the Department's memorandum, the taxpayer asserts that neither of the arguments of the Department have merit. Regarding the assertion in the second argument, that the corporation's bankruptcy tolls the period of limitations for the issuance of the NPL, the taxpayer maintains that the Department is relying on the collection language in the applicable statute and that procedures for collecting a penalty are different and distinct from the procedures for issuing a notice of penalty liability. (See Taxpayer's Reply to Memorandum of the Department of Revenue p. 2)

I find the arguments for the taxpayer convincing regarding the assessments made according to returns filed by the taxpayer, in this case the "B" and "H" assessments. I do not find the argument convincing regarding the assessments made by the Department based upon a change in the taxpayer's return and at those times issued a Notice of Tax Liability, as was done with the "G" and "K" assessments.

Once an Notice of Tax Liability is issued, the notice establishes the obligation of the taxpayer to the Department. The Notice of Tax Liability becomes the document that must be relied upon regarding the proper segment of the statute of limitations language. Clearly, a Notice of Tax Liability may be addressed by the bankruptcy court pursuant to its discretion regarding a determination of tax liability as found at 11 USCA §505.

I therefore find that the statute of limitations was tolled during the bankruptcy proceedings for the "G" and "K" assessments, and, therefore, the NPL was issued timely, within the three year period after all court proceedings had concluded, regarding those assessments.

Where a return constitutes the basis of a liability, the statute is clear that an NPL must be issued within three years after the return is filed. I agree with the argument found at page two of the taxpayer's reply memorandum that the Department is relying on language in the statute that refers to the collection of taxes³ and that

³. Ill. Rev. Stat., ch. 120, ¶452½, currently 35 **ILCS** 735/3-7(d) which states:

In addition to any other remedy provided for by the laws of this State, and provided that no hearing or proceeding for review is pending, any Section of a tax Act which provides a means for collection of taxes shall in the same manner and to the same extent provide a means for the collection of the penalty imposed by this Section. The procedures for the filing of an action for collection of the penalty imposed by this Section shall be the same as those prescribed by a tax Act for the filing of an action for collection of the tax assessed under that Act. The time limitation period on the Department's right to bring suit to recover the amount of such tax, or portion thereof, or penalty or interest from such person, ... shall not run during: (1) any period of time in which the order of any Court has the effect of enjoining or restraining the

particular section is not relevant regarding the issuance of the NPL in question as far as the "B" and "H" assessments. In order to be valid, the NPL had to be issued within three years of the filing of the returns that the Department accepted and for which the Department did not issue a Notice of Tax Liability by the taxpayer. A portion of the NPL at issue, therefore, was not valid because it was not timely issued.

Based upon the foregoing, I recommend that the part of NPL No. XXXX, corresponding to the "B" and "H" assessments, be dismissed based upon the fact that the issuance of that portion of the notice is barred by the relevant statute of limitations. I also recommend that the part of NPL No. XXXX, corresponding to the "G" and "K" assessments, be upheld in its entirety.

Respectfully Submitted,

Barbara S. Rowe
Administrative Law Judge
September 19, 1997

Department from bringing such suit or claim against such person, or (2) any period of time in which the order of the Court has the effect of enjoining or restraining the Department from bringing suit or initiating other proper proceedings for the collection of such amounts from the taxpayer,